SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25

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CAMPAIGN FOR FISCAL EQUITY, INC., et al.,	:	
Plaintiffs,	:	
- against -	:	Index No. 111070/93
THE STATE OF NEW YORK, et al.,	:	Hon. Leland DeGrasse, J.S.C.
Defendants.	:	

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DEFENDANTS' MEMORANDUM OF LAW TO REFEREES REGARDING BURDEN OF PROOF, HEARINGS AND NEW YORK CITY PARTICIPATION

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Dated: New York, New York
August 12, 2004

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DEFENDANTS' MEMORANDUM OF LAW TO REFEREES REGARDING BURDEN OF PROOF, HEARINGS AND NEW YORK CITY PARTICIPATION

Defendants submit this memorandum of law in response to the panel's direction that the parties brief the following issues.

1. The burden of proof in these proceedings;
2. Whether it would lawful for the special referees to conduct a public hearing at which interested persons be allowed to make statements, and the parties' positions about such a public hearing;
3. Whether New York City should be granted leave to intervene as a party or be granted *amicus curiae* status.

PRELIMINARY STATEMENT

On June 23, 2003, the Court of Appeals issued an opinion in this case holding that the State's funding for public schools in New York City was in violation of the Education Article of the New York State Constitution, N.Y. Const., Article XI, Section 1. The Court of Appeals remitted the case to the trial court for further proceedings in accordance with its opinion.

On August 3, 2004, Justice Leland DeGrasse of the New York Supreme Court issued an order appointing the present panel of referees (the "panel") pursuant to CPLR 4320. *See Campaign for Fiscal Equity, Inc. v. State of New York*, Order of Justice DeGrasse dated Aug. 3, 2004 (the "August 3 Order"). The August 3 Order directed the panel "to hear and report with recommendations on what measures the State has taken to follow the [] directives [contained in

the *CFE II* order] and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System."

The State submits that (1) plaintiffs bear the burden of persuasion on the issue of whether the State's compliance plan is constitutionally adequate, (2) it is inappropriate as a matter of law for the panel to conduct public hearings on the constitutional adequacy of the State's plan; and (3) it is inappropriate as a matter of law for New York City to participate as a party-plaintiff. The State does not oppose the City's request for *amicus curiae* status for the purpose of filing a legal brief, but the City's role should be confined to briefing, with the presentation of evidence limited to the parties to this litigation.

POINT I

PLAINTIFFS BEAR THE BURDEN OF PERSUASION IN ANY CHALLENGE TO THE CONSTITUTIONALITY OF THE STATE'S PROPOSED OR ENACTED PLAN

It is well settled legal doctrine that the burden of proof in judicial proceedings encompasses two distinct burdens, the burden of production (sometimes referred to as "the burden of going forward") and the burden of persuasion. *See Caltabiano v. New York State Employees' Retirement Sys.*, 135 A.D.2d 113, 115-116 (3d Dep't 1988); 4 *Bender's New York Evidence* § 10.01 (2004); *McCormick, Evidence* § 336 (5th Ed. 1999). The party that bears a burden of production on an issue is obligated to come forward with enough evidence on that issue -- in light of the applicable evidentiary standard -- to permit a trier of fact to find in its favor on the issue. This showing shifts the burden of production back to the party's adversary to present contrary evidence or face whatever consequences result from failing to do so. The party with the burden of persuasion is required -- after all of the parties' evidence has been presented -- to convince the trier of fact that certain facts are true based on the applicable evidentiary standard. *See Caltabiano*, 135 A.D.2d at 115-116; 4 *Bender's New York Evidence* § 10.01; *McCormick, Evidence* § 336.

While the burden of production may shift during the course of a proceeding from one

party to the other, the burden of persuasion remains throughout the proceeding on the party to whom it was originally assigned. *See Caltabiano*, 135 A.D.2d at115-116; *People v. Robinson*, 97 Misc. 2d 47, 63 (Sup. Ct. Kings Cty. 1978); 4 *Bender's New York Evidence* §§ 10.01, 10.02; *McCormick, Evidence* § 336. Generally, the party that has the burden of pleading a fact is assigned both the burden of production and the burden of persuasion on that fact. *See* 4 *Bender's New York Evidence* § 10.01; *McCormick, Evidence* § 337. Additional considerations, such as the tendency to place burdens on the party seeking to change the status quo, policy considerations, convenience, fairness and a judicial estimate of the probability of the truth of the fact asserted, may provide a basis for a shifting of the usual allocation of burdens. *See McCormick, Evidence* § 337; *see also Liberty Lumber Co. v. Pye*, 44 Misc. 2d 950, 951 (N.Y. Dist. Ct. Nassau Cty. 1965) ("The criteria to be used in determining allocation of the burden would seem to be first, *stare decisis*, second, in the absence of controlling authority, 'fairness, convenience and policy' and third, . . that the party having the affirmative on an issue also has the burden of persuasion as to that issue.")

A. The Presumption and Burdens Applicable to Constitutional Challenges And the Factors Normally Considered in Allocating Burdens Demonstrate that Plaintiffs Bear the Burden of Persuasion

In the instant case, the State acknowledges that it has the initial burden of going forward by placing before this panel its plan for compliance with the CFE II order. If the State's plan were to be in the form of enacted legislation, an objection to that legislation by plaintiffs on the ground that it is insufficient to satisfy the *CFE II* order would constitute a facial attack on the constitutionality of that legislation. In that situation, under New York law the State would be entitled to a presumption that the legislation is constitutional and plaintiffs would bear the heavy burden of overcoming that presumption by proof beyond a reasonable doubt.[1] *See Local Gov't*

[1] The highest courts of several other states have reviewed legislation enacted in response to a finding that the state's prior school funding system was unconstitutional and held that such remedial legislation is entitled to a presumption of constitutionality. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995); *Fayetteville Sch. Dist. Number 1 v. State Bd. of Educ.*, 313 Ark. 1, 7, 852 S.W.2d 122, 125 (Ark. 1993); *Robinson v. Cahill*, 69 N.J. 449, 456,

Assistance Corp. v. Sales Tax Asset Receivable Corp., 2004 N.Y. LEXIS 1049, *17-18 (2004) (challenger bore burden to overcome the strong presumption of constitutionality that attaches to every statute by proof beyond a reasonable doubt -- "where the statute concerns public financing programs, courts are required to exercise restraint and give deference to the legislative enactment, unless the program is patently illegal" (internal citation and quotations omitted)); *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (facial attack required challenger to overcome the "presumption of constitutionality . . . by proof beyond a reasonable doubt" which meant showing that "'in any degree and in every conceivable application the legislative enactment suffers wholesale constitutional impairment'"); *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) ("Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" (internal citations omitted)).

In addition, although to date no legislation amending the school financing or accountability systems has been enacted, the State defendants have ascertained the actual cost of a sound basic education in New York City. In this case funding reform has been proposed that would overcome any gap. This is a step in the lawmaking process. This action is entitled to appropriate deference from the court. For that reason, plaintiffs bear the burden of proof to overcome the presumption of constitutionality that attaches to this process. The Court and this panel need only determine whether the proposed reform and any corresponding legislation are consistent with the costing out study. The policy reasons for deference to this process apply here

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355 A.D.2d 129, 132 (N.J. 1976); *Abbott v. Burke*, 149 N.J. 145, 168, 174, 693 A.D.2d 417, 428, 431 (N.J. 1997); *Unified Sch. Dist. No. 229 v. Kansas*, 256 Kan. 233, 236-238, 885 P.2d 1170, 1173-1175 (Kan. 1995). Two of these courts also recognized that in accordance with the presumption of constitutionality, the burden of proof is on the party challenging the legislation. See Edgewood, 917 S.W.2d at 725 ("we begin with the presumption that [the remedial legislation] is constitutional; the burden of proof is on those parties challenging this presumption"); *Fayetteville Sch. Dist. Number* 1, 313 Ark. at 7, 852 S.W.2d at125 ("the burden of proof is on the party challenging the legislation to prove its unconstitutionality, i.e., that the legislation is not rationally related to achieving any legitimate objective of the government under any reasonably conceivable fact situation").

in recognition that legislative enactments are "quintessentially the product of the democratic lawmaking process" through which competing concerns are negotiated and requirements imposed by the State and federal constitutions are accommodated. *Cohen v. New York State Legislature*, 94 N.Y.2d 1, 8 (1999); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992).

B. New York Law Providing for Enforcement of Non-Monetary Judgments Demonstrates that Plaintiffs Bear the Burden of Persuasion on the Issue of the State's Compliance.

In *CFE II* the plaintiffs obtained non-monetary relief against the State, and now seek enforcement of that relief. In considering the burdens for such enforcement, the panel may be guided by CPLR 5104, which generally addresses enforcement of non-monetary judgments under New York law. *See also Van Nostrand v. Town of Denning*, 203 A.D.2d 687 (3d Dep't 1994) (CPLR 5104 is exclusive mechanism for enforcement of judgment granting injunction). The party seeking to enforce a non-monetary judgment pursuant to CPLR 5104 bears the burden of proving by a reasonable certainty all of the elements required for such enforcement. *See Callanan Indus. v. White*, 123 A.D.2d 56, 58 (3d Dep't 1986) *Yalkowsky v. Yalkowsky*, 93 A.D.2d 834, 835 (2d Dep't 1983);10 *Weinstein, Korn & Miller, New York Civil Practice* ¶ 5104.15; *see also Powers v. Powers*, 86 N.Y.2d 63, 69 (1995).

The allocation of the burden of proof to the judgment holder in an enforcement proceeding under CPLR 5104 applies where, as here, the enforcement proceeding is separate from the merits phase of the litigation . The allocation of the burden of proof in such a proceeding follows the usual rule that the party seeking enforcement of the judgment has the burden of persuasion. In the context of this case, CPLR 5104 and related case law support the State's position that plaintiffs bear the burden of proof by a reasonable certainty of all of the elements required for relief.

C. Under Applicable New York Law, the Plaintiffs Bear the Burden of Persuasion Throughout These Proceedings.

The plaintiffs have throughout this case pressed a constitutional challenge to State action, and they continue to do so in this remedies phase. Plaintiffs now plead that the State remains in

violation of the constitution. The rationale for allocating the burden of persuasion to plaintiffs in the current context follows from both the policy reasons that underlie the presumption of constitutionality that attaches to legislative enactments, and the factors usually considered in allocating the burden of proof. The State accepts that it has the burden of production on what it proposes as compliance with the order *CFE II*, and will provide the panel and plaintiffs with a plan concerning the State's educational funding and accountability system as required by the Court of Appeals. The State submits that the burden of production will then shift to plaintiffs who will be given the opportunity to present their objections to the State's plan. Once plaintiffs provide their objections the parties will seek to resolve any disputes regarding the constitutional adequacy of the plan through written submissions with the possibility of a hearing if the written submissions fail to resolve all outstanding matters. After all of the parties' evidence has been submitted it should be plaintiffs' burden to persuade the panel and the court that the State's plan is constitutionally inadequate.

D. The Cases Cited by Plaintiffs to Support a Shift of the Burden of Persuasion to the State Are Distinguishable

Plaintiffs cite to state and federal cases in their previously filed memorandum of law for their argument that the State bears the burden of persuasion on the issue of the State's compliance with the *CFE II* order. [2] None of these cases cite New York law and each is readily distinguishable on the facts, the procedural posture of the case, or the legal principles applied therein. *See e.g.* unpublished opinion. Superior Court of New Jersey in *Abbot v. Burke* applying New Jersey law; two decisions by the Wyoming Supreme Court applying Wyoming law. -- *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) and *State of Wyoming v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001). These cases are based on Wyoming law, including its provision that education is a fundamental right. *See* 907 P.2d at 1266-1267; 9 P.3d 535-536, thus placing the burden on the state defendant throughout under a strict scrutiny test.

[2] See July 19, 2004 *Memorandum Regarding Certain Compliance Matters*.

However, that standard does not apply under the New York State Constitution, *see Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48-50 (1982), or under the United States Constitution. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973);[3] *DeRolph v. State*, 83 Ohio St. 3d 1212, 699 N.E.2d 518 (Ohio 1998) applying Ohio law;[4]

Finally, plaintiffs cite to several federal school desegregation cases. Those cases applied a presumption and burden shifting scheme as part of the remedy for claims of intentional race discrimination in violation of the Fourteenth Amendment. See Pl's' Memo at pp. 4-5 (citing *Jenkins v. Missouri*, 959 F. Supp. 1151 (W.D. Mo. 1997), *aff'd*, 122 F.3d 588 (8th Cir. 1997); *United States v. City of Yonkers*, 833 F. Supp. 214 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 40 (2d Cir. 1994); *United States v. Fordice*, 505 U.S. 717 (1992); and *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973)). Reliance on those desegregation cases is unavailing. The presumption and burden shifting doctrine crafted by the Supreme Court for school desegregation cases and applied in those cases was designed to prompt state school officials to eradicate continuing effects of past discriminatory practices in violation of the United States Constitution by placing the burden on them to show that current racial imbalances were not the result of

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[3] Plaintiffs had the burden of persuasion in the merits phase of this case, see CFE II, 100 N.Y.2d 893, 919 (2003), and the two Wyoming cases cited by plaintiffs actually support the proposition that the burden of persuasion remains with them in the remedy phase of this case.

[4] Likewise, *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997) cited by the plaintiffs provides no principled support for their position since the decision contains nothing more than a conclusory statement in a footnote regarding allocation of the burden of proof. See Hull, 950 P.2d at 1143 n.2. The plaintiffs' reference to *Lake View School Dist. No. 25 v. Huckabee*, 2004 Ark. LEXIS 37 (Ark. Jan. 22, 2004) is puzzling because it is a very short, two-paragraph *per curiam* decision recalling the court's mandate due to the defendants' non-compliance and announcing the court's intention to appoint a master. The decision does not "enumerate a set of issues" the master is to "evaluate and examine" as described in plaintiff's memorandum, Pl's' Memo at p. 4, and it says nothing about the allocation of the burden of proof. Plaintiffs most likely intended to cite another decision in the *Huckabee* case, *Lake View School Dist. No. 25 v. Huckabee*, 2004 Ark. LEXIS 69 (Ark. Feb. 5, 2004). That decision does discuss the appointment of two Masters and the matters they are to evaluate, but it adds nothing to the proposition plaintiffs seek to advance because it says nothing about the allocation of the burden of proof on the issue of the defendants' compliance.

continuing intentional discrimination. *See Keyes*, 413 U.S. at 206-211 & n.17. Such cases have no application to the issue of which party bears the burden of persuasion on the enforcement under New York law of the Court of Appeals *CFE II* decision requiring accountability and financing reforms.

POINT II

PUBLIC HEARINGS ON THE CONSTITUTIONAL ADEQUACY OF THE STATE'S PLAN ARE INAPPROPRIATE AS A MATTER OF LAW

This panel has been charged pursuant to CPLR Article 43,and in its report and recommendation functions is subject to CPLR § 4320, which states: "A referee to report shall conduct the trial in the same manner as a court trying an issue without a jury." Accordingly, the panel must conduct these proceedings as if it were conducting a non-jury trial in a courtroom. This contemplates the calling of witnesses by parties in an adversarial setting, subject to oath and cross examination, and in consideration of these procedural safeguards made part of a record for appellate review. The CPLR does not contemplate public hearings in the context of litigation. This process were it being conducted in a courtroom would not include a hearing at which interested persons make statements, and the same standards should apply to these proceedings.

POINT III

NEW YORK CITY MAY BE GRANTED *AMICUS* STATUS TO FILE A LEGAL BRIEF, BUT SHOULD NOT PARTICIPATE AS A PARTY [5]

New York City asks to intervene as a party-plaintiff opposite defendant New York State notwithstanding the ruling of the Court of Appeals in a companion case that the City lacks the

[5] We wish to bring to the panel's attention a matter of some sensitivity but one that we believe has to be raised in a case that is going to be very carefully scrutinized by the public. In this case, even more than most, it is critical that there be full disclosure of any facts that might be of concern in terms of the public perception of this process. We are aware that Judge Milonas, who was nominated by the City of New York, was President of the Association of the Bar of the City of New York, an organization that filed amicus briefs in earlier proceedings in this case. Further, we note that the City currently has an application before this panel. We do not believe that these facts necessarily create a conflict such that recusal is required. We suggest only that the members of the panel consider whether disclosure should be made on the record so that all relevant facts are before the public.

capacity to be a plaintiff in such an action against the State. *See City of New York v. State of New York*, 86 N.Y. 2d 286 (1995) (*City v. State*). In its letter to the panel seeking such status the City cites no legal authority which would override the explicit holding by the Court of Appeals, merely suggesting without legal support that the prior ruling may not pertain in this remedies phase. [6]

The rationale for the ruling in *City v. State* is that New York City is a political subdivision of the State and nothing has occurred since 1995 which would alter this relationship and that disability. Lack of capacity is a bar to a municipality to litigate against the State. A governmental subdivision which avers capacity to maintain an action against the State bears the burden of establishing it possesses such capacity, *Community Board 7 v. Schaffer*, 84 N.Y. 2d 148, 159 (1994), and the City has not satisfied its burden of showing there is some change which has removed its incapacity. As a consequence, the City and this panel are precluded on this issue. *See Continental Can Co. v. Rapid-American Corp.* 80 N.Y. 2d 640, 649 (1993); *People v. Evans*, 94 N.Y, 2d 499, 502 (2000).

In *CFE II*, the Court of Appeals reiterated that "the Board of Education and the City [of New York] are creatures or agents of the State', [to which the State has] delegated whatever authority over education they wield". 100 N.Y. 2d at 922. Notwithstanding the role that locally-elected school boards have played historically in financing and delivering education, in *CFE II*, the Court of Appeals held that "the State has ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools".[7] *Id.*

The remedy phase of the CFE II litigation is intended to focus on reforms to the current system of financing school funding and managing schools. While the Court of Appeals held that such reforms could be enacted legislatively or pursued administratively, the responsibility for

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[6] August 11, 2004 letter of Michael Cardozo to the panel.

[7] The law is clear that the City of New York cannot assert a claim against the State alleging a violation of the Education Article of the State Constitution, which is the claim in this case. *City v. State.*

devising and implementing such reforms was clearly and squarely placed on the *State*. Accordingly, while the City is no doubt keenly interested in the outcome of this litigation, and the impact that further rulings of the courts may have on the City's finances or educational opportunities, pursuant to Court of Appeals' precedent in a series of education cases, the City is simply not a proper party here, and the *City v. State* ruling is *res judicata*..

The State does not oppose the City's being granted *amicus* status for the purpose of filing a legal brief. However, the City seeks to enlarge its proposed *amicus* role to include functions ordinarily reserved for parties, i.e. the presentation of evidence. Insofar as the City possess evidence relevant to the panel's charge, we presume it will work cooperatively with the panel to be sure that knowledgeable witnesses and documents are made available for submission by the parties as would be the case in any litigation. There is no reason to believe that the parties will be unable, with the City's cooperation, to present all necessary relevant evidence. We submit that this manner of presentation will operate to keep this matter focused on the actual and concrete disputes between the parties to this litigation.

CONCLUSION

For the foregoing reasons, the State submits that (1) plaintiffs bear the burden of persuasion on the issue of whether the State's compliance plan is constitutionally adequate, (2) it is inappropriate as a matter of law for the panel to conduct public hearings on the constitutional adequacy of the State's plan; and (3) it is inappropriate as a matter of law for New York City to participate as a party-plaintiff. The State does not oppose the City's request for *amicus curiae* status for the purpose of filing a legal brief, but the City's role should be confined to briefing, with the presentation of evidence performed by the parties to this litigation.

Dated: New York, New York
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AFFIDAVIT OF SERVICE

STATE OF NEW YORK }ss:
COUNTY OF NEW YORK }

JUDITH M. YOUNG, being duly sworn, deposes and says:

That she is employed as a Law Department Document Specialist in the office of ELIOT SPITZER, the Attorney General of the State of New York, the attorney for defendants herein. On the 12th day of August, 2004, she served the annexed **DEFENDANTS' MEMORANDUM OF LAW TO REFEREES REGARDING BURDEN OF PROOF, HEARINGS AND NEW YORK CITY PARTICIPATION** upon the following named persons:

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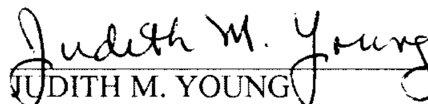
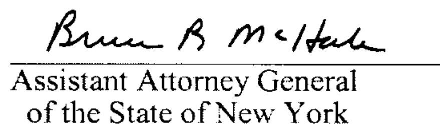


JUDITH M. YOUNG

Sworn to before me this
13th day of August, 2004



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